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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARKEE DUSHON WEBB, Defendant and Appellant.	A151957 (Contra Costa County Super. Ct. No. 051609825)

Markee Dushon Webb (defendant) appeals from a judgment entered after a jury found him guilty of five drug-related charges and the trial court sentenced him to four years in county jail. He contends the trial court erred in: (1) ordering that money confiscated from him upon his remand into custody be applied toward fines and fees the court imposed; and (2) sentencing him to the middle term rather than the low term or probation. We reject the contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On June 12, 2017, an amended information was filed charging defendant with possession of cocaine for sale (Health & Saf. Code, § 11351; count 1), transportation of cocaine for sale (Health & Saf. Code, § 11352, subd. (a); count 2), possession of methamphetamine for sale (Health & Saf. Code, § 11378; count 3), transportation of methamphetamine for sale (Health & Saf. Code, § 11379, subd. (a); count 4), and possession of marijuana for sale (Health & Saf. Code, § 11359; count 5).

May 2015 Incident

At about 3:25 a.m. on May 30, 2015, a Richmond police officer saw defendant asleep in a parked car. The officer contacted defendant, searched the car, and found a marijuana cigar, a digital scale, a plastic bag full of marijuana, and a box of plastic bags. The marijuana weighed a total of 22.4 grams. Defendant had $400 on his person in various denominations.

December 2015 Incident

At about 5:40 p.m. on December 19, 2015, a Richmond police officer stopped defendant as he was driving a car that had no license plates. When the officer performed a patsearch of defendant, a clear plastic bag fell out of defendant's pants. Inside that bag were nine individually wrapped packages of cocaine and one bag of methamphetamine. The officer searched defendant's car and found many unused plastic bags and a digital scale with residue of narcotics on its surface. A canine unit that searched the car found a plastic container with marijuana inside. Laboratory tests revealed the substances from defendant's car were 20.9 grams of marijuana and 14.5 grams of methamphetamine, and that one of the nine bags contained 0.173 gram of cocaine.

Defendant had $709 cash in various denominations on his person. He also had a cell phone that contained incoming messages asking for "dub," which refers to $20 worth of drugs, "white girl," which refers to powdered cocaine, "trees," which refers to marijuana generally, and "blow," which refers to cocaine in its powder form. In one message, someone informed defendant that he or she no longer wished to be defendant's "customer."

Defendant testified he has a cannabis card and keeps marijuana for his own use and for friends who also have cannabis cards. He occasionally trades marijuana for services such as haircuts. He also gives marijuana to others, who then give "the same amount" of marijuana back to him. Defendant thought the messages on his cell phone referring to "trees" related to tobacco and that "white girl" referred to an individual. He

claimed he did not know that the bag he had when he was arrested on December 19, 2015, contained drugs. He had found the bag on the ground at a nearby gas station that day and had driven just one block from the gas station before he was pulled over by police. An employee of the gas station who had known defendant for some time testified that he remembered seeing defendant pick something up from the ground in the gas station parking lot "this past winter."

A jury convicted defendant on all counts. The trial court sentenced defendant to the middle term of four years in county jail for the principal offense of transportation of cocaine for sale (count 2) and imposed concurrent sentences for the other offenses—three years each for possession of cocaine for sale (count 1) and transportation of methamphetamine for sale (count 4), two years for possession of methamphetamine for sale (count 3), and six months for misdemeanor possession of marijuana for sale (count 5). The court stayed the sentences for counts 1 and 3 under Penal Code section 654[1] and imposed a total of $1,700 in fines and fees consisting of a $1,350 restitution fine (§ 1202.4, subd. (b)), a $200 court operations fee (§ 1465.8), and a $150 conviction assessment fee (Gov. Code, § 70373).

DISCUSSION

1. Confiscated Funds

At sentencing, the trial court noted that defendant, who had been released on his own recognizance during his trial, had $1,000 in cash on his person when he was taken into custody after his conviction. The court ordered that the $1,000 be applied toward satisfying the $1,700 in fines and fees it had imposed.[2] The court noted it was not aware

[1] All further, undesignated statutory references are to the Penal Code.

[2] The court initially suggested that the $709 in cash on defendant's person at the time of his earlier arrest also be used to satisfy the $1,700 obligation, but ultimately did not do so because the $709 had already been seized and was subject to forfeiture proceedings.

of authority explicitly stating it could or could not issue the order but stated the money "can and should be used to pay off the financial obligations that I am imposing here." The court stated the order would become final in 10 days. "If between now and then you wish to ask for a hearing on this because you think that there may be legal authority for the proposition that I cannot order that that money be utilized in the way that I am indicating, then if you would let [the prosecutor] know and we can schedule a hearing."

Defense counsel said, "Okay," then stated, "For the record, I will just object . . . ." The court then stated, "[O]nce [defense counsel has] taken a look at it and doesn't have any other objection to it, at day ten, I'm going to sign it and that will be the final order." Defendant did not request a hearing or submit briefing.

On appeal, defendant contends the trial court erred in ordering that the $1,000 be applied toward the $1,700 in fines and fees. Assuming defendant preserved the issue for appeal, we conclude the contention fails on the merits.

Defendant's main argument in support of his contention appears to be that the trial court should have but "did not cite any cases supporting its view that it had the authority to make such an order." In his reply brief, he again refers to the "court's failure to find authority for or against its ability to issue the order . . . ." A trial court's order, however, is presumed correct, and it is the defendant's burden to affirmatively show error on appeal with legal argument and authority. (*People v. Giordano* (2007) 42 Cal.4th 644, 666; *People v. Box* (2000) 23 Cal.4th 1153, 1190, fn. 8 [defendant's perfunctory argument, " 'lacking as it is in specificity, virtually defies review' "], disapproved on another ground by *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.) Here, defendant cites no authority to support his position that a court is required to state the legal authority on which it relies before issuing an order, or that its failure to do so renders its order invalid.

In any event, there is authority to support the trial court's order. As noted, the court imposed $1,350 in restitution fines—$300 for each of the four felony convictions

and $150 for the misdemeanor conviction—as it was required to do under section 1202.4, subdivision (b), which provides: "In every case where a person is convicted of a crime, the court shall impose a . . . restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record." (See also § 1202.4, subd. (b)(1) [$300 minimum for felonies and $150 minimum for misdemeanors].)

Section 1202.4, subdivision (f) authorizes a court to "specify that funds confiscated at the time of the defendant's arrest, except for [those already subject to forfeiture proceedings], be applied to the restitution order if the funds are not exempt for spousal or child support or subject to any other legal exemption." The Penal Code defines an arrest as "taking a person into custody, in a case and in the manner authorized by law." (§ 834.) Defendant, who had been released into the community during his trial, was taken into custody upon his conviction, i.e., he was arrested; thus, the funds confiscated from him at that time were properly applied to the $1,350 restitution fines.

We further conclude that the fact the trial court did not explicitly order the $1,000 to be directed toward the $1,350 in restitution fines—as opposed to the remaining $350 in other fines or fees—is immaterial. While the record does not demonstrate how the court allotted the $1,000, the Penal Code provides that satisfaction of restitution fines takes precedence over other court-imposed fees. (§ 1203.1d, subd. (b)(3).) Thus, the $1,000 was statutorily directed to be applied first toward his restitution fines. Here, defendant's restitution fines totaled more than the amount taken from his person and, thus, the $1,000 fell within the amount section 1202.4, subdivision (c) authorized for collection.

Defendant contends in the alternative that if the trial court had the authority to issue the order, it should have also granted him the same rights given to criminal defendants who are required to reimburse their counties for the cost of legal services provided to them. Section 987.8, subdivision (e)(1), on which defendant relies, provides that a defendant, "[a]t a hearing," is entitled to various rights, including the "right to be

heard in person," "present witnesses and other documentary evidence," and "confront and cross-examine adverse witnesses." Defendant cites no authority to support his position that this section, which relates to the determination of whether discretionary attorney fees should be imposed, also applies to the payment of mandatory restitution fines under section 1202.4.

In any event, *People v. Nystrom* (1992) 7 Cal.App.4th 1177 supports the conclusion that defendant was not entitled to a hearing. There, the defendant argued the trial court erred in failing to hold a hearing before ordering that $1,100 seized from him be given to the victim under a restitution order. (*Id*. at p. 1181.) The Court of Appeal rejected his argument, holding that because there was a valid restitution order in place, there was "no question that the victim was entitled to the money and it was unnecessary to prove that the money seized from Nystrom actually belonged to the victim. [Citation.] Nystrom was not entitled to notice and another hearing before the court ordered payment of restitution from available funds." (*Id.* at pp. 1181–1182.) Similarly, here, there was no question as to the validity of the $1,350 restitution fine, which was mandated by statute. Accordingly, there was no need to determine whether defendant owed the money, and the court did not err in declining to hold a hearing.

2. Sentencing

Defendant contends the trial court erred in sentencing him to the middle term rather than the lower term or probation. We disagree.

Criteria affecting the decision to grant or deny probation include facts relating to the crime, such as the nature, seriousness, and circumstances of the crime, and facts relating to the defendant, including the defendant's prior record of criminal conduct, prior performance on probation, and whether the defendant is remorseful. (Cal. Rules of Court, rule 4.414(a)(1) & (b)(1), (2), (7).) When a trial court denies probation and sentences a defendant, it "must select the upper, middle, or lower term on each count for which the defendant has been convicted." (Cal. Rules of Court, rule 4.420.) In making

this determination, a court "may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision." (*Ibid*.)

When imposing a sentence, the trial court must state its rationale for its sentencing choice on the record but need not make specific individual findings as to each aggravating or mitigating factor the parties set forth. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "One aggravating factor is sufficient to support the imposition" of a court's chosen term. (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1371.)

A trial court's determination of whether to grant probation and its choice of the appropriate prison term are reviewed for abuse of discretion. (*People v. Sandoval*, *supra*, 41 Cal.4th at p. 847.) " 'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary.' " (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) Absent a clear abuse of discretion, " 'the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside . . . .' " (*Id.* at pp. 977–978.) Specifically as to the denial of probation, courts have held that a defendant who is denied probation bears a heavy burden to show the trial court has abused its discretion. (E.g., *People v. Carbajal* (1995) 10 Cal.4th 1114.)

Here, the trial court stated it was denying probation based on defendant's criminal history, which includes "a sequence of ten adult convictions, four of which are felonies, two of which are felonies[] that involve potential for violence, one in which he is carrying a firearm and another one where he committed a felony assault." The court noted that defendant had been placed on probation a number of times "and it has done literally no good. He continues to reoffend and he's done that for . . . a number of years and over and over again . . . ." The probation report, which the court stated it had read, stated defendant lacked remorse for his crimes. Due to uncertainty whether one of defendant's prior convictions constituted a violent offense, the court was unsure if the three strikes law rendered defendant ineligible for probation, but the court assumed he was eligible for

the sake of sentencing and found probation was not appropriate. The court then said the same "thought . . . process . . . gets me to the midterm of four years as to Count Two," and went on to discuss the sentences for the remaining counts.

The record shows the trial court properly weighed the factors in this case, including defendant's criminal history, prior performance on probation, and lack of remorse. (Cal. Rules of Court, rules 4.414(b)(1), (2), (7) [criminal and probation histories and lack of remorse], 4.421(b)(2)(5) [criminal and probation histories].) While defendant cites other factors the court could have found in support of a grant of probation or an imposition of the lower term, we decline to "reweigh the valid factors that bore upon the decision below." (*People v. Delgado* (2013) 214 Cal.App.4th 914, 919.)

Defendant also argues the trial court relied on an irrelevant and improper factor by referring to the amount of money—$1,000—that was found on defendant's person when he was taken back into custody. The record shows, however, that the court discussed the $1,000 while trying to decide whether to apply the funds toward the fines and fees it had imposed. The court did not state that the $1,000 was at all a factor in its consideration of whether to deny probation or to impose the middle term. Defendant also takes issue with the fact that the court briefly questioned his girlfriend—who was addressing the court regarding the intended four-year sentence—about the source of the money defendant had on his person. This line of questioning, however, appears to have been a response to defense counsel's claim that defendant was "sorely lacking in financial means . . . ." This exchange came after the court had stated its intended sentence, and there is no indication that it unduly influenced its sentencing decision.

DISPOSITION

The judgment is affirmed.

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Wiseman, J.*

WE CONCUR:

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Fujisaki, Acting P. J.

_____
Petrou, J.

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* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.